07-CV-01881-M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

Gabriel Ruiz-Diaz, Hyun Sook Song, Cindy Lee Marsh, and Gadiel Gomez,

Plaintiffs

vs.

United States of America; et al.

Defendants

No. C07-1881 RSL

Motion for Temporary Restraining Order

Note For: December 3, 2007

FACTUAL BACKGROUND[1]

The Plaintiffs, Cindy Lee Marsh, Gabriel Ruiz-Diaz, Hyun Sook Song, and Gadiel Gomez, are religious workers. They are in valid non-immigrant religious worker (R-1 visa) status which will expire in the near future. Plaintiffs Gabriel Ruiz-Diaz, Hyun Sook Song and Gadiel Gomez have family members who have derivative status (R-2 visa), which will also expire in the near future. The Plaintiffs and their family members are eligible to apply for adjustment of status under INA §245(a), 8 U.S.C. §1255(a).

All of the Plaintiffs are beneficiaries of a Petition for Special Immigrant (Form I-360). On or about August 28, 2006, Impact Church International in Gig Harbor, Washington filed an I-360 petition for the benefit of Plaintiff Marsh. On or about November 16, 2007, the Church of the Nazarene in Kent, Washington filed an I-360 petition for the benefit of Plaintiff Ruiz-Diaz. On or about May 12, 2006, Zion Castle Church in Federal Way, Washington filed an I-360 petition for the benefit of Plaintiff Song. On or about October 6, 2006, Central Presbyterian

[1] The facts described in this section are based on the attached Declarations and Exhibits.

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Church in Norwichtown, Pennsylvania filed an I-360 petition for the benefit of Plaintiff Gomez. None of these I-360 petitions filed for the benefit of the Plaintiffs has been approved. All remain pending.

All of the Plaintiffs are statutorily eligible to file an application for adjustment of status and all desire to file an application for adjustment of status. Plaintiffs Cindy Lee Marsh, Gabriel Ruiz-Diaz and Hyun Sook Song have submitted applications for adjustment to CIS. These applications have been or will be rejected and returned based on CIS's policy, codified at 8 C.F.R. §245.2(a)(2)(i)(B), of refusing to accept concurrent applications from religious workers. Plaintiff Gadiel Gomez desires to file an application for adjustment of status but he is prevented from doing so because of CIS's policy.

If CIS accepts these applications for filing and adjudicates them, then the Plaintiffs and their family members will be authorized to remain in the United States until the applications are adjudicated. However, pursuant to 8 C.F.R. §245.2(a)(2)(i)(B), CIS has refused or will refuse to accept these applications for adjustment of status. In addition, CIS has returned or will refused or will refuse to issue employment authorization for the benefit of Plaintiffs. CIS routinely grants employment authorization for individuals with pending applications for adjustment of status. See 8 C.F.R. §274a.12(c)(9). Because of CIS's refusal to accept these applications, the Plaintiffs and their family members will not be allowed to remain in the United States once their R-visas expire; as of the date that their R-visas expire they will begin to accrue "unlawful presence" for purposes of INA §212(a)(9), 8 U.S.C. §1182(a)(9); and they will become ineligible for adjustment of status under INA §245(c), 8 U.S.C. §1255(c).

Thus, the Plaintiffs are in a Catch 22 situation: currently they and their family members are statutorily eligible for adjustment of status, but CIS refuses to accept their applications for filing; at some time after their R-visas expire, CIS may accept their applications for filing, but if the applications are filed after the R-

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visas expire then CIS will deny the applications pursuant to INA §245(c) because they are out of status.

Plaintiffs maintain that CIS's policy of refusing to accept applications for adjustment of status from R-visa holders is unlawful, a violation of the statute and the United States Constitution. In this motion, Plaintiffs request a temporary restraining order requiring the Defendants to allow Plaintiffs to remain in the United States with employment authorization pending a resolution of the claims presented in this lawsuit.

LEGAL ARGUMENT

A. Standard for Temporary Restraining Order.

The standard for granting preliminary injunctive relief involves a balancing of the probability of success on the merits with the possibility of irreparable injury. According to the Ninth Circuit, the court must find "either (1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor." Andrieu v. INS, 253 F.3d 477, 479 (9th Cir. 2001) (en banc) (standard for granting a stay of deportation). The Ninth Circuit has pointed out that:

> These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified.

Id. Under this standard, as explained below, temporary injunctive relief should be granted for the benefit of the Plaintiffs and their family members.

B. Statutory and Regulatory Background for Religious Workers.

United States immigration law distinguishes between nonimmigrants, who have permission to remain in the United States temporarily, see INA §101(a)(15), 8 U.S.C. §1101(a)(15) (list of nonimmigrant categories) and immigrants, who have permission to reside in the United States permanently, see INA §201(b)(2)(A), 8 U.S.C. §1151(b)(2)(A), and INA §203(a) and (b) (list of immigrant categories).

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For purposes of this case, the relevant non-immigrant category is INA §101(a)(15)(R), which establishes a non-immigrant visa category for certain religious workers. Individuals who qualify for an R-visa are allowed to remain in the United States in order to perform religious work for up to five years. INA §101(a)(15)(R)(ii). Family members (spouse and children) are eligible to remain in the United States as derivative beneficiaries for the same amount of time. 8 C.F.R. §214.2(r)(8). If approved for an R-visa, the initial period of authorized stay in the United States is valid for a period of up to three years, which can be extended for a period of two additional years. 8 C.F.R. §214.2(r)(4) and (5).

Immigrant visas are divided into family-based visas, described in INA §201(b)(2)(A), 8 U.S.C. §1151(b)(2)(A) ("immediate relatives") and INA §203(a), 8 U.S.C. §1153(a) (other family members), and employment-based immigrant visas, described in INA §203(b), 8 U.S.C. §1153(b). The first step in obtaining an immigrant visa is for the appropriate family member or employer to file a visa petition to classify the non-citizen in the appropriate immigrant category. In the case of family-based immigrant visas, the U.S. citizen family member files a Petition for Alien Relative (Form I-130) for the benefit of the non-citizen. In the case of an employment-based immigrant visa, for non-citizens who fall under the first three employment categories (INA §203(b)(1), (2), or (3)), the U.S. employer files an Immigrant Petition for Alien Worker (Form I-140). If the non-citizen falls under the fourth employment category (INA §203(b)(4) (religious worker), then the employer (which must be a recognized religious organization) files a Petition for Special Immigrant (Form I-360). The approval of the visa petition constitutes the agency's finding that the non-citizen is classified in the appropriate immigrant category.

The second step in the immigration process is for the person who qualifies for a family-based or employment-based immigrant visa is to file an application for permanent resident status. If the person is in the United States in a non-

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immigrant visa category, he or she can adjust status in the United States pursuant to INA §245, 8 U.S.C. §1255, if the following requirements are met:

(1) the applicant files an application for adjustment of status;[2]

(2) the applicant is eligible to receive an immigrant visa;[3]

(3) the applicant is admissible to the United States for permanent residence;[4]

(4) an immigrant visa is immediately available at the time the application is filed.[5]

INA §245(a), 8 U.S.C. §1255(a). Immediate family members of the primary applicant are considered derivative beneficiaries and can adjust status at the same time. INA §203(d), 8 U.S.C. §1153(d).

Certain individuals who would otherwise be eligible for adjustment of status are disqualified by operation of INA §245(c), which provides that section 245(a) is not applicable (with certain exceptions) to:

> an alien . . . who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States.

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[2] The application for adjustment of status is filed on Form I-485.

[3] An applicant is "eligible to receive an immigrant visa" if he or she is eligible to be classified for a family-based visa, or eligible to be classified for an employment-based visa. In this case, the Plaintiffs are in the "fourth preference employment-based category", INA §203(b)(4).

[4] An applicant is "admissible to the United States for permanent residence" if he or she is not inadmissible under the grounds of inadmissibility listed in INA §212(a), 8 U.S.C. §1182(a).

[5] An immigrant visa is "immediately available" if the preference category in which the applicant falls is "current" according to the U.S. Department of State Visa Bulletin issued for the month in which the application for adjustment of status is filed. See 8 C.F.R. §245.1(g)(1). In this case, the fourth preference employment-based category is current.

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INA §245(c)(2), 8 U.S.C. §1255(c)(2).[6]

A person files an Application for Adjustment of Status by filing Form I-485 with the appropriate regional CIS office. For example, persons living in Washington State file the application with the Nebraska Service Center ("NSC") in Lincoln, Nebraska. Once the application has been filed, the applicant is allowed to remain in the United States until a decision is made on the application. If a person departs from the United States after filing the I-485 application, then the application is deemed to have been abandoned. 8 C.F.R. §245.2(a)(4)(ii). While the application for adjustment of status is pending, the applicant is entitled to employment authorization. 8 C.F.R. §274a.12(c)(9).

There is no statutory requirement that before the application for adjustment of status (Form I-485) is filed, an immigrant visa petition (Form I-130, I-140, or I-360) must be approved; the statute provides only that an application for adjustment of status may be filed if the applicant "is eligible to receive an immigrant visa." INA §245(a)(2), 8 U.S.C. §1255(a)(2). The Immigration Service has taken the position that an immigrant visa petition and an application for adjustment of status can be filed concurrently if the applicant is a family-based petitioner or falls under one of the first three employment-based visa categories. In other words, under CIS policies an applicant can file an I-130 and I-485 application concurrently, and can file an I-140 and I-485 application concurrently. However, CIS refuses to accept concurrently filed I-360 and I-485 applications. If the applicant is a religious worker, then CIS will refuse to accept the concurrently

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[6] Section 245(k) provides an exception to this ground for disqualification if:

(1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;
(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days -
(A) failed to maintain, continuously, a lawful status;
(B) engaged in unauthorized employment; or
(C) otherwise violated the terms and conditions of the alien's admission.

INA §245(k), 8 U.S.C. §1255(k).

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filed applications.

C. Likelihood of Success.

Plaintiffs challenge CIS policy of refusing to accept concurrently filed applications if they are filed by religious workers as a violation of the statute and the Constitution. Another similarly situated individual recently prevailed in these arguments in this court. See Hillcrest Baptist Church v. United States, Case No. 06-1042Z (W.D.Wash.), Order dated February 23, 2007, p. 16 ("The Court declares that CIS's policy to accept concurrent filings of Form I-140s and Form I-485s, but not to accept concurrent filings of Form I-360s and Form I-485s . . . violates the Equal Protection component of the Due Process Clause of the Fifth Amendment of the United States Constitution"). The decision in Hillcrest Baptist Church establishes that Plaintiffs have a likelihood of success on the merits of their Equal Protection claim.

In addition, it is a clear violation of the statute to refuse to accept applications for adjustment of status from individuals who are eligible to apply. Section 245(a) of the Immigration and Nationality Act establishes the requirement that must be met in order to properly file an application for adjustment of status. The requirements are the following:

(1) the applicant must file an application for adjustment of status;

(2) the applicant must be eligible to receive an immigrant visa;

(3) the applicant must be admissible to the United States;

(4) an immigrant visa must be immediately available at the time the application is filed.

The Plaintiffs in this lawsuit and their family members clearly meet these requirements.

With respect to requirement (2), the Defendants may argue that the Plaintiffs are not "eligible to receive an immigrant visa" because the visa petition (Form I-360) has not been approved. In other words, Defendants may argue that the appropriate visa petition classifying the applicant for an immigrant visa must

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be approved before an applicant is statutorily eligible to apply for adjustment of status. However, such an argument would be unfounded. The Defendants, by their very own practice, admit that there is no statutory requirement that the visa petition must be approved before the application for adjustment of status can be filed. In the context of family-based applications, CIS has a policy of accepting concurrently filed I-130 and I-485 applications, and in the context of employment-based applications, CIS has a policy of accepting concurrently filed I-140 and I-485 applications. See 8 C.F.R. §245.2(a)(2)(i)(B). In other words, the I-485 application is generally accepted for filing before the underlying immigrant visa petition is approved, if the applicant is a family-based or a non-religious employment-based applicant. It is only concurrently filed applications from religious workers that are rejected. If the statute required that the underlying visa petition must be approved before the applicant can file an application for adjustment of status, then 8 C.F.R. §245.2(a)(2)(i)(B) would violate the statute.

In sum, the named Plaintiffs in this lawsuit have submitted or will submit their applications for adjustment of status to CIS; they are eligible to receive an immigrant visa; they are admissible to the United States; and an immigrant visa is immediately available for them. In other words, the named Plaintiffs are statutorily eligible to file an applications for adjustment of status. Their family members are statutorily eligible to apply for adjustment of status as derivative beneficiaries under INA §203(d), 8 U.S.C. §1153(d). There is no legitimate reason for CIS to refuse to accept the applications for adjustment of status.

As a matter of Due Process, if Congress creates a benefit and the applicant is statutorily eligible to apply, the agency must accept the application and adjudicate the application. The right to apply for statutory benefits established by Congress is a right protected by the Due Process Clause. See, e.g. Haitian Refugee Center v. Nelson, 872 F.2d 1555, 1562 (11th Cir. 1989), aff'd sub nom. McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (due process right to

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apply for Special Agricultural Worker legalization program). See generally Mallette v. County Employees' Retirement System II, 91 F.3d 630, 638-639 (4th Cir. 1996) (rejecting argument that applicants have no due process right to apply for a statutory benefit). See also Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 553 (9th Cir. 1990) (statutory right to apply for political asylum).

Furthermore, under the Administrative Procedures Act, there is no need for CIS to make an immediate decision on the adjustment of status applications and reject them as unqualified. According to the APA:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. §705. Under §705, CIS has the authority to accept applications for adjustment of status and postpone the date of any action taken on the applications until after the I-360 petition is adjudicated. If CIS had taken such action, then there would be no basis for rejecting the applications for adjustment of status. According to §705, this court can "to the extent necessary to prevent irreparable injury" order the agency to accept the I-485 applications for filing and postpone the effective date of the agency's action until after the date of the adjudication of the I-360 petition.

D. Burden on Plaintiffs.

The Plaintiffs in this case face substantial hardships and irreparable injury. According to CIS, a background check must be conducted before the I-360 application is approved, and this process can sometimes take years. According to CIS's position, the Plaintiffs and their family members must leave the United States and wait for a process that may take years to complete. Losing these religious workers will create substantial hardships on the religious organizations for which they work. See Declarations of Cindy Lee Marsh, Gabriel Ruiz-Diaz, Hyun Sook Song, and Gadiel Gomez, attached hereto as Exhibits.

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The issue in this case is whether the named Plaintiffs and their family members can file applications for adjustment of status. If a temporary restraining order is not granted, then these individuals will become ineligible for adjustment of status under INA §245(c) before this court has an opportunity to rule on the merits of their claim. Thus a temporary restraining order should be granted at least so that the named Plaintiffs and their family can remain in the United States without accruing characteristics - "unlawful presence" and "unauthorized employment" - that would disqualify them from adjustment of status.

E. Religious Freedom Restoration Act

Finally, a temporary restraining order should be issued in light of the Religious Freedom Restoration Act ("RFRA"). RFRA provides:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . .
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1. The Government's refusal to allow the named Plaintiffs and their family members to remain in the United States imposes a substantial burden on the religious organizations they work for and interferes with their ability to provide pastoral guidance in religious matters and teach children in religious settings. In order to justify the refusal, the Government must show that the refusal to allow the named Plaintiffs to remain in the United States while the I-360 application is being processed is "in furtherance of a compelling governmental interest" and is "the least restrictive" means of protecting that interest. Such a showing cannot be made. Non-religious workers are allowed to remain in the United States while their I-140 applications are processed. As the Government's treatment of non-religious workers shows, there are other less restrictive means of protecting the Government's interest.

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CONCLUSION

For the foregoing reasons, a temporary restraining order should be issued allowing the named Plaintiffs and their family members to remain in the United States with employment authorization until this Court can resolve the claims. Without such an order, these religious workers and their family members will not be able to obtain the benefits that they are statutorily entitled to.

Dated this 21st day of November, 2007.

Robert Pauw
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CERTIFICATE OF SERVICE

I, Mari Matsumoto, hereby certify that I served a copy of the following documents:

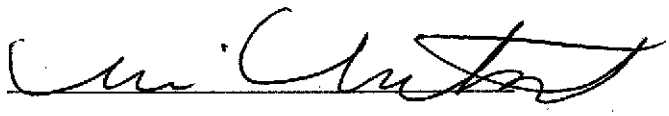
Complaint
Motion for Temporary Restraining Order
Proposed Order

on the following persons:

Assistant United States Attorney
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271

by personal delivery.

Dated this 21st day of November, 2007.



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